Supreme Court, U.S.
FILED
MAY 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-1401

In the Supreme Court of the United States

OCTOBER TERM, 1979

OHIO COUNTY AND INDEPENDENT AGRICULTURE SOCIETIES, DELAWARE COUNTY FAIR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1401

OHIO COUNTY AND INDEPENDENT AGRICULTURE SOCIETIES, DELAWARE COUNTY FAIR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the order of the court of appeals in this federal income tax case affirming the Tax Court's dismissal of its suit for a declaratory judgment under Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C.). The question presented is whether Section 7428 grants jurisdiction to the Tax Court to consider petitioner's action for a declaratory judgment to invalidate the Commissioner's ruling that petitioner was an exempt organization under Section 501(c)(3) of the Code and eligible for tax-deductible contributions under Section 170(c)(2).

The pertinent facts are as follows: In a ruling issued in 1960, the Commissioner of Internal Revenue determined that petitioner qualified for tax exemption as an educational organization described in Section 501(c)(3) of

the Code (Pet. App. B, 2a; A15).[1] The Commissioner continues to recognize petitioner as such an organization (A23, A37, A38). Seeking to avoid the tax imposed on the unrelated business income of Section 501(c)(3) organizations, petitioner brought this action in the Tax Court under Section 7428 of the Code for a declaratory judgment to establish its qualification as a state instrumentality described in Section 170(b)(1)(A)(v) of the Code (Pet. App. B, 2a; A2, A5).[2] Petitioner also filed with the Tax Court a separate petition for a redetermination of a deficiency, which similarly raises petitioner's eligibility for treatment as an organization described in Section 170(b)(1)(A)(v) (Pet. App. B, 2a). The Tax Court granted the Commissioner's motion to dismiss the action for a declaratory judgment for lack of jurisdiction on the ground that there was no actual controversy within the meaning of Section 7428 as to petitioner's continuing qualification for exemption under Section 501(c)(3) (Pet. App. A; A22-A24). The court of appeals affirmed *per curiam* (Pet. App. B).

The court of appeals correctly held that the Tax Court had no jurisdiction to consider petitioner's action for declaratory judgment under Section 7428 of the Code. In *Bob Jones University* v. *Simon*, 416 U.S. 725, 749-750 (1974), this Court observed that "an especially harsh regime" had been imposed on an organization which had

---

[1]"A" refers to the separately bound record appendix filed in the court of appeals.

[2]Petitioner assumed that if it qualified as a state instrumentality it would be entitled to exclude its gross income from taxation pursuant to Section 115 of the Code and thereby avoid the tax on unrelated business income imposed by Section 511 *et seq.* of the Code (A6, A20; see A13-A19).

been denied a favorable tax-exemption ruling under Section 501(c)(3) and which was thus ineligible for advance assurance of deductibility of contributions under Code Section 170(c)(2). At that time, such an organization was precluded from obtaining immediate judicial review of such an advance ruling. Instead, it had to wait until it could petition the Tax Court for a redetermination of a deficiency, or until it paid the assessed tax and could sue for a refund.[3] In the meantime, the organization's donor support would often diminish and result in serious financial problems.[4] See also *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 763 n.14 (1974).

In order to relieve this hardship, Congress added Section 7428 to the Internal Revenue Code in 1976.[5] The statute was designed to allow an organization, in a case of actual controversy, to obtain a declaratory adjudication as to its initial or continuing qualification for exemption

---

[3]See Sections 6212, 6213, 6532 and 7422 of the 1954 Code; 28 U.S.C. 1346, 1391.

[4]Most organizations seeking Section 501(c)(3) exemption rulings find it necessary, as a practical matter, to be listed in the Internal Revenue Service's "Cumulative List" (Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 (Publication No. 78)) in order to assure potential contributors that their donations will qualify as charitable deductions under Section 170(c)(2) of the Code. See Rev. Proc. 72-39, 1972-2 Cum. Bull. 818. Consequently, as this Court recognized in *Bob Jones University* v. *Simon, supra*, 416 U.S. at 729-731, 749-750, the Commissioner's revocation of an organization's exempt status and concomitant withdrawal of advance assurance of deductibility may deprive the organization of necessary financial support before this action can be reviewed in a suit for refund or for redetermination of a deficiency.

[5]Section 7428 was added by Section 1306(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1717.

under Section 501(c)(3).[6] The accompanying House and Senate Committee Reports make clear that Section 7428 was enacted "[i]n order to provide an effective appeal from an Internal Revenue Service determination that an organization is not exempt from tax, or is not an eligible donee for charitable contributions." H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 282, 284 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 585, 587 (1976).

Contrary to petitioner's contention (Pet. 5), Congress did not intend Section 7428 to serve as a vehicle for contesting the Commissioner's favorable determinations recognizing an organization's exempt status under Section 501(c)(3) and its eligibility for tax deductible contributions under Section 170(c)(2). Section 501(c)(3) is therefore not at issue in this case. In reality, petitioner seeks a declaratory judgment that it is a state instrumentality under Section 170(b)(1)(A)(v) in order to qualify for the exclusion provided by Section 115(a) for income accruing to political subdivisions, and to circumvent the unrelated business income tax imposed by Section 511 *et seq.* (Pet. App. B; A6, A20, A26). But petitioner's right to be treated as a state instrumentality may properly be adjudicated only in a suit for refund or for redetermination of a deficiency.[7] Since the Commissioner has not

---

[6]Section 7428(c) provides for assurance of deductibility for certain contributions made during the pendency of the adjudication.

[7]Indeed, because petitioner has raised the question as to its Section 170(b)(1)(A)(v) status in a pending Tax Court petition for redetermination of a deficiency, the present action could not appropriately be maintained even if it otherwise fell within the purview of Section 7428. Section 7428 is not designed to supplant the customary channels for litigating tax questions. The Committee Reports

revoked and, in fact, does not dispute petitioner's continuing eligibility as a Section 501(c)(3) organization and charitable donee, there is no controversy subject to review by the declaratory judgment procedures of Section 7428. See H.R. Rep. No. 94-658, *supra*; S. Rep. No. 94-938, *supra*; cf. *New Community Sr. Citizen Housing* v. *Commissioner*, 72 T.C. 372 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

---

accompanying Section 7428 state that, except upon a showing by the organization that substantial time would be conserved by permitting it to proceed under Section 7428, the courts will not entertain a declaratory judgment suit regarding a period for which a statutory notice of deficiency has already issued. A court which has accepted pleadings for a declaratory judgment must yield to a court which has accepted pleadings for a redetermination of a deficiency. H.R. Rep. No. 94-658, *supra*, at 286 (1975); S. Rep. No. 94-938, *supra*, at 588 (1976); joint Comm. on Taxation, General Explanation of the Tax Reform Act of 1976, 94th Cong., 2d Sess. 404 (1976), reprinted in 1976-3 Cum. Bull. (vol. 2) 416. Petitioner has failed to make the requisite showing.